The Madras Law Journal.

PART XII.] MARCH, 1918. [VOL. XXXIV

MALABAR LAW: INDIVIDUAL PROPERTY AND SUCCESSION.

In *Kanakan Isvaran Kandan* v. *Sirkar* [1], two classes of heirs are mentioned: one, descendants of great-great-grand-mother downwards of a deceased person between whom and himself community of property existed and who are called Anandravans or seshakars; secondly those who claim from more remote female ascendants and who are known as Kuttukars or Dayadies. The property escheats to the Crown only on failure of both these classes of heirs but the Crown has a claim for adiyara-fees in the case of the second class of heirs. (See also *Kunjan* v. *Ulahaunan Ouseph*[2].) The classification, it will be noticed, is a clumsy adaptation of the Hindu Law rule as to Bandhus, with a graft from the rule as to co-parcenery ceasing with the great grandson. In fact there seems to be no limit, either under the Hindu Law or the Marumakkattayam Law, within which alone co-parcenery can exist and the rule is obviously one for revenue purposes. In *Raman Govindan* v. *Raman Raman* [3], the doctrine of lapse as laid down by Holloway, J., in *Kallati Kunju Menon* v. *Palat Erracha Menon* [4], was accepted as sound law and it was further elaborated in *Lekshmi Narayan* v. *Eachooty Mathevi* [5], in its application to divided Kootukars or dayadies. It was laid down in that case, that the property of the last surviving member of a Tarwad would, on his or her death, lapse jointly to the Tarwads having community of pollution or pula sambandam, the nearer excluding the more remote, nearness being however determined not by degrees of propinquity alone but also by the circumstance as to who divided off last. If the Tarwad in which the succession vests is divided into Tavazhis or branches without community of rights, the branches might *inter se* enforce division of the property. *Raman Govindan* v. *Raman Raman* [3], was dissented from in *Panapilla Jankapillai Narayanpillai* v. *Kanakku Krishnan Narayanan* [6], as

1. (1882) 2 T. L. R. 38.
2. (1899) 17 T. L. R. 117.
3. (1899) 15 T. L. R. 57.
4. (1864) 2 M. H. C. R. 162.
5. (1899) 17 T. L. R. 69.
6. (1906) 22 T. L. R. 278. (F. B.)

regards certain classes of property and was ultimately overruled in *Sakli Kerulan* v. *Sakthi Sakthi* [1], where it was held that the self-acquisitions of a member devolve on the thavazhi and not on the Tarwad. "If propinquity is the test for heirship in Marumakkatayam law to a property left by a Marumakkattayee last survivor who had absolute power of disposal during his life-time over that property" argue the majority consisting of Sadasiva Iyer, C. J., and Hunt, J., "the logical result is that the law of inheritance as to self-acquisitions should also be based on propinquity of relationship, the only limitation imposed being that the legal person that inherits should be or represent a Thavazhi and not inherit as a mere individual." Even here it will be noticed we are under the spell of doctrine of lapse though in a more qualified form. That there should be individual heirship at some stage could not be helped for instance when all the members of the Tavazhi are divided from each other. Even then the learned Judges would apparently first notionally transfer the property to the Thavazhi and then divide the properties between the various members. How that division is to take place, whether according to the Sub-Thavazhis it may consist of or according to the number of members, is in itself a problem to be determined according to the view one is inclined to take of the rights of individual members at a partition of the family property. How much of the theory enunciated in *Lakshmi Narayani* v. *Eachooty Mathavi* [2] survives *Sakthi Kemlan* v. *Sakthi Sakthi* [1] has not apparently yet been the subject of any decision in Travancore. Under the Hindu Law, as between the descendants of a co-parcener, the status of non-division is a ground of preference. The right of the descendants by birth forms the basis of that preference under the Hindu law. Group succession would seem to be a circumstance in favour of its recognition under the Malabar law in all cases, but the rule of succession by the Thavazhi being a rule of succession and not a rule of survivorship in any form, preference of individual members of the Thavazhi on the ground of non-division would, indeed, be an anomaly. Preference on the ground of being the latest to be divided off, from the propositus is a fanciful elaboration for which there is no analogy whatever in the Hindu Law.

Under the Aliyasanathana Law of South Canara, the effect of decisions is that property goes to the nearest Thavazhi

1. (1908) 24 T. L R. 102. 2 17 T. L. R. 69.

Antamma v. *Kaveri* [1], *Manjappa Ajri* v. *Marudevi Hengeru* [2] and it is assumed in *Timma* v. *Daramma* [3] that if several divided Thavazhis become entitled, they take equally and as tenants in common. (See *Madhevi Amma* v. *Kunhunni Menon* [4] for Malabar Law.)

In this matter, the Malabar Law as administered at present is in an unsatisfactory condition. The doctrine of lapse laid down by Holloway, J., in spite of the destruction of its theoretical basis in the Sivaganga case managed to survive in many an *obiter dictum* and was upheld by the Full Bench in *Govindan Nair* v. *Sankaran Nair* [5], by a majority, by Sir *Arnold White, C. J.*, on the ground of *stare decisis* and by *Abdur Rahim, J.*, on the ground of custom. The authority of this decision is considerably shaken by the decision in the later Full Bench in *Chakkara Kannan* v. *Kunbi Pocker* [6], which vigorously combats the view and rejects it so far as succession to the property of females is concerned. As it is, in the case of males, the rule of lapse to the Tarwad obtains, but in the case of females, the rule of succession to the Thavazhi obtains. Even in the case of males, property acquired out of the savings of Putravakasam property or joint acquisitions of the members of the branch would be taken by the Branch and not by the Tarwad, *Komu Nair* v. *Ittiath Amma* [7]. The effect of the later Full Bench is to restrict the application of the decision of the earlier Full Bench to cases in which there is a Tarwad undivided from the propositus and renders inadmissible the elaboration of the doctrine of lapse contained in *Lakshmi Narayani* v. *Eachooty Madhavi* [8]. The point was raised in S. A. 1811 of 1915 but their lordships did not express a final opinion though their inclination was against it. The actual decision was when a family divides most of the properties belonging to it, it is divided in status and the properties so divided and subsequent acquisitions therewith go to the Tavazhi though in respect of the undivided property it may be, the whole Tarwad continues joint in status. The best analogy to the doctrine of lapse afforded by the Hindu Law is the *usage of survivorship* obtaining in zamindaris and in respect of it the latest decision of the Privy Council is that when there is a

1. (1884) I. L. R. 7 M. 575.
2. (1915) I. L. R 39 M. 12.
3. (1887) I. L. R. 10 M. 362.
4. (1893) 4 M. L. J. 43.
5. (1909) I. L. R. 32 M. 351.
6. (1915) I. L R. 39 M. 317. F. B.
7. (1900) 10 M. L. J. 59.
8. 17 Tr. L. R. 69.

division of status in the family, *i. e*, to say in respect of all the partible parties, the usage of *survivorship* in respect of the impartible estate ceases and the property thereafter descends like ordinary separate property (*Tarakumari* v. *Chaturbhuj Narayan Singh*[1]) and there cannot be any justification for appealing to the doctrine of lapse for the purpose of giving preference to the Tarwad, much less any particular section of the Tarwad as being the last to divide off from the propositus. The decision of the Privy Council in *Sivagnana Tevar* v. *Periasami*[2], is authority for excluding properties in respect of which there has been a division from the operation of the doctrine of lapse though there is a tarwad in existence joint and undivided in respect of the bulk of its properties. The rule of succession as distinguished from the rule of survivorship or lapse is that property descends to one's own descendants (which is possible only in the case of females), in default, the mother's Tavazhi, *i. e.*, mother and her descendants, in default to the grandmother's Tavazhi and so forth. Where it should stop, it is difficult to say but it may be assumed as in the Travancore cases that the limits for purposes of pollution mark also the limits for purposes of inheritance though the right of inheritance may not depend on the right or duty to make funeral offerings.

Under the Travancore Law, a convert would lose all rights of inheritance; but, in British India, he will have to be treated as a divided member and his rights determined on that basis. That is to say, in cases where the doctrine of lapse applies and even in other cases, if his Tavazhi is undivided from the deceased he may be cut off as any other divided member is. So far as the rights of succession to the property of the convert are concerned those would be determined by the law to which he is subject and if under that law mothers, brothers or sisters or the descendants of the mother or sister though of another faith are entitled to take, we do not believe the fact that legal marriage is not recognised among the Malayalees would stand in the way of their inheriting the property. It may be too much however to expect those systems to recognise the descendants of the males when the law by which these are governed does not recognise heritable relationship. The ground is wholly untrodden ground and naturally we have to speak with considerable reserve.

---

1. (1915) I L. R. 42 C. 1179. 2. (1878) I. L. R. 1 M. 312. (P. C.)

Again, there are piebald systems of inheritance like that of Moplas or Tiyas which, on account of the complications they present have to be dealt with separately.

Ss. 23 and 24 of the Malabar Marriage Act also introduce certain variations in the ordinary law of inheritance. S. 23 says where a man following the Marumakkathayam or Aliyasantana Law of inheritance dies intestate in respect of his self-acquired or separate property or any portion thereof, one half of such property or in the event of no member of his Tarwad surviving him the whole of such property shall devolve on his widow if he leaves no children or on his children in equal shares if he leaves no widow or on his widow and children in equal shares if he leaves both widow and children; S. 24 says where a woman following Marumakkathayam or Aliyasantana law of inheritance dies intestate in respect separate or self-acquired property or any portion thereof one half of such property shall devolve in equal shares upon her children and in the event of no member of her Tarwad surviving her the whole of such property shall devolve on her husband. S. 2 defines children as sons and daughters of parents whose sambandham has been registered under the Act whether born before or after such registration. In the case of any one whose personal law permits adoption children include adopted sons and daughters. These sections it will be noticed form a serious departure from the ordinary rules of inheritance. But as they have a restricted operation no question has yet arisen under these sections.

It has been decided under the Aliyasanthana Law that leprosy and insanity which are recognised as grounds of exclusion under the Hindu Law cannot be regarded as such under that system. *Chandu* v. *Subba* [1], *Sanku* v. *Puttumma* [2]. As stated in *Sanku* v. *Puttumma* [2] "the test in such cases under the Hindu law is whether the defect is such as would be sufficient to prevent the claimant from offering the funeral oblations. Right of succession under the Aliyasanthana Law is in no way dependent on the capacity to offer funeral oblations." There is no reason why the Malabar Law should in this matter differ from the Aliyasanthana Law.

---

1. (1908) I. L. R. 13 Mad. 209. 2. (1890) I. L. R. 14 Mad. 289 at p. 293.

SUMMARY OF ENGLISH CASES.

Hawkey v. Stirling. 1918 (1) K. B. 63.

Sunday Observance Act, S. (1)—Amusement caterer—Sale of goods—Tradesman.

Section (1) of Sunday Observance Act provides that "No tradesman, artificer, workman, labourer or other person whatsoever, shall do or exercise any worldly labour, business or work of their ordinary callings upon the Lord's day or any part thereof (works of necessity and charity only excepted)".

An amusement caterer who carries on business on week days and Sundays at premises where any one who chose played at certain games paying the amusement caterer for the implements used in such game or where the player gets from the caterer some article on achieving a certain result is a tradesman within the meaning of the section and liable to conviction.

Rex v. London Committee Council : Ex parte Corrie. 1918 (1) K. B. 68.

Mandamus—By-law—Consent at the discretion of Public Authority—Resolution to refuse consent—Whether mandamus lies.

Where under a By-law made in exercise of statutory powers, a Public Authority is to grant permission at its discretion to do certain acts and the Public Authority passed a resolution that all existing permissions should be determined and that no new permissions should be granted thenceforth, such discretion is not properly exercised by passing a general resolution to the above effect and acting thereon and Mandamus will lie against the Public Authority for the proper exercise of the discretion in individual cases.

JOTTINGS AND CUTTINGS.

Authority to compromise.—According to the practice books, a solicitor has general authority to compromise an action, *unless expressly prohibited* (Annual Practice, 1918, pp. 1912 and 1961); and it would seem that the same general, but limited, authority extends to a solicitor's agent while engaged in the conduct of proceedings. But if Mr. Justice McCardie is right in the

considered judgment which he delivered the other day in a rather curious action (Welsh *v.* Roe; January 17), the authority is wider than this, and there is no limitation once the action has been placed in the solicitor's hands. In the learned Judge's opinion "It is clear that a solicitor has an implied authority to compromise the action, and that no limitation on such implied authority avails the client unless such limitation be brought to the notice of the other side." That was decided so long ago as 1696 in *Latuch* v. *Pasherante* (6 Salk, 86), and there are later judgments of Wilde, C. J. and Campbell, C. J. to support the same proposition. But the more recent authorities have not gone so far, and there are numerous cases both in the Common Law and Equity Courts where the question of prohibition of a settlement, or of a compromise only on certain clear conditions, has been seriously entertained (cf. *Hickman* v. *Berens* 1895), and compromises been reopened though made in open Court by counsel, who are supposed to have even wider powers than solicitors. In the latest case (*Little* v. *Spreabury,* 1910) the Court (Bray and Coleridge, JJ.) carefully refrained from deciding the point, but the judgment there proceeded on the assumption that if there were an express prohibition the party dissenting would not be bound. That is still perhaps the safest line to take notwithstanding Mr. Justice McCardie's judgment, for there was no allegation in the action before him that the solicitor had acted in defiance of any prohibition, and his observations on that point may be regarded as *obiter.—The Law Journal, 26th January, 1918.*

* * *

The Lord Chief Justice's Leave-taking :—The impressive ceremony in the Lord Chief Justice's Court, when the Solicitor-General, on behalf of the Bar, wished the Earl of Reading 'God speed' in the great task he has undertaken in America, was a conclusive answer, so far as the legal profession is concerned, to the suggestion that the Lord Chief Justice ought not to have accepted his temporary position as High Commissioner in the United States without resigning his judicial office. The presence of the judges, as well as the large gathering of the Bar, was ample proof—if, indeed, proof were needed—that in the opinion of those best qualified to speak on such a matter, the traditions of the office of Lord Chief Justice will not suffer by Lord Reading's temporary relinquishment of its duties for the purpose of render-

ing a great national service in another, and in these momentus times, not less important sphere. There is, in truth, something that is analogous between the duties which the Lord Chief Justice ordinarily performs and those which he has been chosen to discharge in 'the greatest cause.' As he himself observed, in replying to Sir Gordon Hewart's address, he will still be engaged in America, 'in the administration of justice, and in the preservation of liberty according to the laws of humanity and civilisation.' The whole profession, not without a feeling of pride that one of their member has been chosen for so responsible a post, will, as the Soliciter-General remarked in his very felicitous speech, look forward eagerly to welcoming the Lord Chief Justice at the earliest moment on his return, especially if, as the whole nation hopes and believes, his labours in America help to bring about 'the peace which is victory, and the victory which is lasting peace.'—*Ibid., 19th January, 1918.*

***

'*The Freedom of the Seas.*' Simple and unchallengable as the proposition 'the freedom of the seas' appears to be it is really as ambiguous as the old 'Rights of Man.' What are 'rights'? What is 'freedom'? President Wilson's latest pronouncement on the war aims of the Allies, with its formula "Absolute freedom of navigation upon the seas outside territorial waters, alike in peace and in war, except as the seas may be closed, in whole or in part, by international action for the enforcement of international covenants', is the best answer which has yet been given to the modern query. America has always been foremost in the demand for the free use of the world's highways in war as in peace, but she has hitherto been practically free from the chances of war outside her coasts, and it is only now, when she is involved as a belligerent in such a conflict, that she can appreciate the full consequences of the claim. The general assent which has been accorded to the President's statement promises the removal at the next Peace Conference of one of the stumbling blocks of diplomacy, and we shall welcome it, as we did the Declaration of Paris after our last great war, because it will relieve England, as the greatest of maritime powers, of a fruitful cause of misunderstanding with other nations. It will also have the great advantage of frustrating in future the attempts of rivals like Germany to foster suspicion and jealousy of the

maritime predominance which is necessary and natural to us as an island power. We desire, not less than other nations, to make the sea, as it originally was, perfectly free, thought not in the original sense—which, as Maine remarked, was that of 'being universally open to depredations.' Grotius is usually acclaimed by Continental writers as the founder of the modern claim to freedom of the seas, but, as Sir John Macdonnell has recently reminded us, our own Queen Bess was the first true defender of the principle, and her victory over the Spanish Armada was a victory for maritime freedom all the world over. So perhaps when the present hostilities cease, a new Declaration of London or of Washington, based on the American President's formula will prove to all the world that with us the freedom of the seas is no mere phrase, but stands for that full freedom which, not our own arbitrament, but the judgment of the common league of Nations will set up for all peoples.—*Ibid.*

***

The Lord Chief Justice's Mission :—Having already eclipsed all other records on the Bench in so many respects, it is no great matter of wonder that the Earl of Reading, as Lord Chief Justice, should courageously take on himself the mission of high political importance to which he is called by command of the King and the desire of the two great English democracies. The petty objections which have been raised in some quarters to the Chief Justice's appointment as the "King's High Commissioner in the United States in the character of Ambassador Extraordinary and Plenipotentiary on Special Mission," on ground of incompatibility between the two offices will find no support in legal circles. On the contrary, it is generally recognised that, great as are Lord Reading's administrative qualities, and valuable as has been his reforming influence in the Courts, there is no special call for these functions in the present disturbed times, while the devotion of all his powers to the unification of the effort between the two Governments is the greatest service which he can now render to the State. There is, indeed, something of poetic justice in the appointment of the successor of Mansfield to undertake this harmonizing task in the crisis which has again welded together the two peoples, whose separation was so largely contributed by the political activity of the "silver-tongued" maintainer of the Mother Country's "rights." The key to the Temple of Peace now lies, we are assured, in the Capital at Washington, and it is

a happy fate which takes there another great advocate and Chief Justice to guide men's minds, and direct their energies, to the opening of the gates.—*Ibid., 12th January 1918.*

***

The Limits of Cross-Examination.—Is an advocate entitled to put a question to a witness suggesting imputations upon his character merely because he has been instructed to do so? At the instance of Judge Graham, K. C., who had before him at the Bow Country Court several months ago a case in which a barrister, in cross-examining the defendant, suggested that she had been guilty of immoral conduct, the Bar Council have laid down five rules for the guidance of counsel in such matters, based upon the material sections of the Indian Evidence Act, 1872, framed by Sir James Stephen. They say—to summarise the rules that questions attacking the character of a witness ought not to be asked unless the advocate has reasonable grounds for thinking that the imputations they convey is well founded; that instructions by a solicitor to put such questions may be regarded *prima facie* by counsel as reasonable grounds for believing the imputations to be true; that no statement of any person other than a solicitor should be so regarded unless he can give satisfactory reasons for his statement; that such questions, whether or not the imputations they convey are well-founded, should not be put if the advocate is of opinion that they would not materially affect the credibility of the witness or relate to matters so remote in time or of such character that they could not have that result; and that "in all cases it is the duty of the barrister to guard against being made the channel for questions which are only intended to insult or annoy either the witness or any other person, and to exercise his own judgment both as to the substance and the form of the questions suggested to him." Such rules must necessarily be somewhat wanting in particularity, but the last one is really the conclusion of the whole matter. Cross-examination is the most powerful weapon in the armoury of the advocate, and any unbecoming use of it, therefore, is all the more regrettable. He cannot, of course, be expected to investigate personally all the statements and suggestions he is instructed to make, but if he acts within the spirit of the Bar Council's final rule—if, in other words, he remembers that he is not a mere

hireling whose function is to make himself the channel of the malice or mendacity of his client the traditions of the profession are never likely to suffer at his hands. *Ibid., 12th January, 1918.*

CONTEMPORARY LEGAL LITERATURE.

A writer in the *Minnesota Law Review* for December 1917. contrasts the Practice and the Law of the Prize Courts of England and Germany. While in England, the Prize Court is but one of the ordinary Courts of the land (though appeals lie to the Privy Council) in Germany it is an *administrative* Court composed only partly of lawyers, the others being Naval, Military and Political Officers. National feeling runs high even in ordinary courts in times of war and it may naturally be expected to affect these administrative courts in a much higher degree. The procedure however of the German Courts is more liberal than the English in this sense that it places no restriction on alien enemies appearing in Courts and pleading their causes either personally or by attorney. The law administered in the English Courts is the international law subject to the ultimate authority of the Parliament and the authority of the King in Council to issue ordinances at variance with international law has been authoritatively denied in the Zamora Case. In Germany, on the other hand, the law administered is in the first instance, the Imperial ordinances and it is only in their absence that recourse is had to international law. In this there is room for apprehending increasing danger to neutral and alien interests. The writer, therefore, urges the establishing of an international world tribunal to deal with those claims.

Another writer in the January part of the same Journal discusses the feasibility of a uniform procedure in all the American Courts subject to modification from time to time by the Supreme Court after the English plan. In America all such questions are complicated by the constitutional questions regarding the powers of States *inter se* and the federal Legislature, the powers of the Congress and the Courts, and the fundamental rights preserved by the charter. The writer shows that none of these present any difficulty in the way of the realisation of this ideal which has the support of most Bar Associations in the country. The sole object of any procedure system should be at the lowest the ascertainment of a just and speedy decision upon the merits according to the principles of substantive law, at the lowest practicable cost, of all

disputes between litigants. How far it is from this ideal being realised in America in criminal cases can be gathered from an article in the Canada Law Journal where it is stated that compared with the murders committed and the number of trials, the acquittals stand highest in America, doubtless due to the great value attached to forms and technicalities there.

Another article in that Review, discusses the power of the Congress to restrain individual liberties and rights reserved by the American Constitution in view of the exigencies of the war. The writer is inclined to the view that it has such power.

In the Canadian Law Times for December 1917, there is an attempt made to differentiate, in the light of the decisions, the degree of care required in the case of licensees, invitees and trespassers. Towards invitees the law insists on reasonable care while it expects bare licensees to take the premises in the condition in which it is, the licensor being liable only if he is guilty of laying a "trap". In the case of trespassers, there is liability only in the case of intentional wrong.

In the Harvard Law Review for the same month Mr. Kales discusses how far contracts in restraint of trade are recognised in America. A contract not to engage in a given business or occupation is assumed to be void where the promisor is already engaged in it and the promisee is not and does not intend to be. The rule does not apply to businesses which though the state regards as lawful, nevertheless considers opposed to public interests such as the liquor business. Restrictive covenants accompanying the promisor's entry into an appenticeship arrangement or made upon his entry into the service of the promisee for the purpose of learning a trade or business are also upheld provided that the restriction is not broader than the business of the master. Similarly restrictive covenants accompanying the sale of a business provided here also the restriction is operative over a less area than that of any state where the restriction applies. In the case of covenants not to carry on a business given by one in the business to another in the business or intending to enter it would be valid subject to this exception *viz.*, that it would not be upheld if it involves the letting down and standing idle of valuable plant. If the plant is purchased also, the covenant will be good.